

EXHIBIT 87

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In accordance with a protective order, the enclosure(s) shall be treated as confidential and shall not be shown to any person other than those persons designated in paragraph 8.2 of the paragraph order.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

----- :
CUSTODIA BANK, INC., :
 :
Plaintiff, :
 : Case No.
vs. : 1:22-cv-00125-SWS
 :
FEDERAL RESERVE BOARD OF :
GOVERNORS and FEDERAL RESERVE :
BANK OF KANSAS CITY, :
 :
Defendants. :
----- :

CONFIDENTIAL DEPOSITION OF
PETER CONTI-BROWN, PH.D.

DATE: Thursday, December 14, 2023
TIME: 8:09 a.m.
LOCATION: King & Spalding, LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

REPORTED BY: Erick M. Thacker
Reporter, Notary

Veritext Legal Solutions
1250 Eye Street, NW, Suite 901
Washington, D.C. 20005

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1 BY MR. MICHAELSON

2 Q Well, but the -- but the regulations
3 that you're referring to included regulations in
4 which the Federal Reserve asserted the power to
5 conduct risk assessments of specific
6 institutions, correct?

7 A That's right.

8 Q And the power to impose restrictions on
9 an individual institution's use of services based
10 on the risk presented by that institution,
11 correct?

12 A The key difference here between my
13 opinion and those regulations is that I am
14 referring to assertion of authority over specific
15 requests to access priced services, the
16 reciprocal for which is the granting of those
17 priced services, not to the regulatory framework
18 that might govern its use.

19 The policy statements that we've read
20 together today refer to the regulatory framework
21 for the use of priced services, including risk
22 assessments, over their use. In the extreme

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1 cases noted in the Reserve Banks, that use might
2 be temporarily suspended or assessments might be
3 offered for those, but nothing in those policy
4 statements referred to legally eligible
5 depository institutions that sought access to
6 those services. They were only to those legally
7 eligible depository institutions that had access
8 to those services. Those policy statements
9 governed the use of those services after they'd
10 been granted.

11 My opinion refers to the question of
12 whether to grant priced services to legally
13 eligible depository institutions in the first
14 instance.

15 Q Okay. And so would you -- would you
16 agree that the history and practice of the
17 Federal Reserve from 1980 to 2015 included the
18 Federal Reserve's assertion of the power to
19 restrict use of services to limit risk?

20 A The word I would replace in your
21 sentence to make it my opinion is to regulate
22 rather than restrict, but yes otherwise.

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1 Q Okay. And would you agree that that's
2 actually long, well recognized that the Federal
3 Reserve has asserted the authority to regulate
4 use of services to limit risk?

5 MR. SCARBOROUGH: Objection to form.

6 THE WITNESS: I would say that the
7 Federal Reserve has long regulated the use of its
8 services for a variety of purposes.

9 BY MR. MICHAELSON

10 Q Including to limit risk to the Reserve
11 Banks?

12 A Yes.

13 Q And including to limit risk to the
14 payment system?

15 A That's a harder question to answer
16 because it's so broad. Even where I see the
17 Federal Reserve asserting in those words, I feel
18 less sure that the risks assessed were to the
19 entire payment system itself. But the risk to
20 the Reserve Banks, I have seen, yes.

21 Q Okay. And you'd agree that this --
22 this historical assertion of power by the Federal

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1 Reserve included the power to conduct
2 individualized risk assessments of specific
3 institutions, correct?

4 MR. SCARBOROUGH: Objection to form.

5 THE WITNESS: Only pursuant to a
6 regulatory framework that preceded the
7 individualized risk assessment, and in that
8 sense, I see the individualized assessment as
9 being a part of the regulatory authority asserted
10 as opposed to separate from it.

11 BY MR. MICHAELSON

12 Q Okay. And where does the Federal
13 Reserve statutory to do that emanate?

14 A I will leave the question to the courts
15 and lawyers to determine legal authority.

16 Q Okay.

17 A I don't offer an opinion on the law.

18 Q You are offering opinion, though, on
19 the intent of the framers of the Monetary Control
20 Act, correct?

21 A That's right.

22 Q Did the -- was it the intent of the

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1 consistency or inconsistency with law of any of
2 the litigants' practices.

3 BY MR. MICHAELSON

4 Q Okay. But you're offering an opinion
5 about congressional intent, correct?

6 A That's right.

7 Q And you're offering an opinion about
8 the Federal Reserve's historical practice, right?

9 A That's right.

10 Q Okay. So let's go through those two.

11 Is it your opinion that consideration
12 of risk to the Reserve Bank in connection with a
13 master account request is inconsistent with
14 congressional intent behind the Monetary Control
15 Act?

16 A I think that to the extent that risk to
17 the Reserve Bank constitutes a de facto
18 supervisory assessment that is usurped from state
19 supervisory authorities, then, yes, it is
20 inconsistent with the intent of the framers of
21 the MCA. And there are instances, including in
22 the ones that I reference in my expert report,

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1 where the Federal Reserve's assertion that it is
2 simply verifying the risks imposed to the Reserve
3 Bank do constitute de facto usurpation of
4 supervisory authority that is not the Fed's to
5 exercise. And so in that sense, yes, I am saying
6 that that is inconsistent with congressional
7 intent.

8 Q And is that a case-by-case
9 determination?

10 A My conclusion on that front?

11 Q Yeah. Or is it across the board, this
12 is inconsistent -- consideration of this
13 principle is inconsistent with legislative
14 intent?

15 MR. SCARBOROUGH: Objection to form.

16 THE WITNESS: Could you -- could you
17 ask that question one more time?

18 BY MR. MICHAELSON

19 Q Well, I'm trying -- I'm trying to
20 understand if -- if it's your opinion that
21 Reserve Banks' consideration of Principle No. 2,
22 risks to the Reserve Bank, in connection with a

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1 master account request is always inconsistent
2 with congressional intent behind the Monetary
3 Control Act.

4 A And my answer there is that the intent
5 of the Monetary Control Act was to equalize
6 access to legally eligible depository
7 institutions to Federal Reserve services.

8 If that access is made conditional on
9 conclusions that the Fed has made for any
10 purpose, risk management or otherwise, then that
11 is inconsistent with the intent of the framers of
12 the MCA.

13 If it's making a determination about
14 the legal eligibility, as we discussed earlier in
15 the day, then that may be consistent with the
16 intent of the framers of the MCA. It also may
17 not be depending on how that is used.

18 Q Well, I'm not talking about the legal
19 eligibility determination. I'm talking about the
20 consideration of the risk to the Reserve Bank.

21 Is consideration of -- of that risk in
22 connection with the master account request

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1 inconsistent with the intent of the framers of
2 the Monetary Control Act?

3 MR. SCARBOROUGH: Objection to form.

4 THE WITNESS: My short answer would be
5 yes, and here's why: If, after the passage of
6 the MCA, the Federal Reserve said, thank you,
7 Congress, for telling us we need equalized
8 service, but you know what, we're going to
9 actually second-guess you here, and we're going
10 to perform our own independent risk assessment
11 about whether legally eligible, state-chartered
12 depository institutions that you just instructed
13 us to give equal treatment to deserve that equal
14 treatment. And if the Federal Reserve did that
15 in its risk assessment leading to the conclusion
16 that access should be prevented, then that would,
17 in fact, be comprehensively inconsistent with the
18 framers of the MCA.

19 Again, we're talking here about access
20 to master accounts in this document. I -- as
21 we've discussed, I haven't come to the same
22 conclusion with respect to different questions

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1 has issued countless banking -- pieces of banking
2 legislation, each with -- especially after 1935
3 and the permanent institution of the FDIC, with a
4 specific lane of movement for the FDIC, OCC,
5 Federal Reserve, and state banking authorities,
6 and so the MCA comes from that legal context.

7 That legal context means that the very
8 kinds of assessments that we're talking about
9 here are a supervisory context for the
10 specifically designated supervisor to respond to.
11 In some cases, that would be the Fed, in some
12 cases, the OCC, in others, the FDIC, and in
13 others, the state banking authorities.

14 But for the Federal Reserve to then say
15 that it has the authority or the -- or it would
16 adopt the practice of usurping these other
17 entities within a financial system is something
18 that I am not aware of anyone around the passage
19 of the MCA even contemplating, including at the
20 Federal Reserve, because it had never been done
21 in that way before.

22 Q If every bank is unique then isn't it

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1 necessary for Reserve Banks to undertake an
2 individualized risk assessment of each
3 institution to assess the risk presented by that
4 institution to the Reserve Bank?

5 A Most emphatically, no. What it should
6 do is defer to those exact determinations by the
7 appropriately situated authority to -- that has
8 been put in place to assess precisely that risk
9 profile. And, again, that might be the Fed if
10 we're talking about member banks, bank holding
11 companies, financial holding companies, et
12 cetera, but it might be the OCC, and it might be
13 the FDIC, and it might be a state banking
14 authority.

15 Q So for Custodia that would be the
16 Wyoming Division of Banking?

17 A That's right.

18 Q And so it's your opinion that the
19 Federal Reserve Bank of Kansas City has to defer
20 to Wyoming Division of Banking's assessment of
21 the risk that Custodia presents to the Federal
22 Reserve Bank of Kansas City?

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1 A That's right. That deference is the
2 beating heart of the dual banking system.

3 Q Okay. And it's your opinion that
4 Congress intended through the Monetary Control
5 Act to empower states to be state-chartered --
6 states to be the gatekeepers of access to Federal
7 Reserve services?

8 A Well, the Constitution does -- does
9 that even preceding the creation of the Federal
10 Reserve System by creating state banks.

11 The Federal Reserve System was created
12 institutionally on top of a system of
13 state-chartered banks and national-chartered
14 banks, and so the order of operations is
15 reversed. The states come first and then the
16 Federal Reserve.

17 Q So referring back to the guidelines,
18 principle 2, here the Board is saying that
19 Reserve Banks should -- connection with an
20 account access request should consider whether
21 the institution presents or creates risk to the
22 Reserve Bank.

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1 condition to clearly identify the risks posed by
2 a financial institution and how that risk can be
3 managed to the satisfaction of the Reserve Bank."

4 Do you see that?

5 A I do.

6 Q Do you have any reason to dispute that
7 Esther George sent that letter to Fourth Corner
8 in January 2015?

9 A I don't have a reason to dispute that
10 Esther George signed that letter. I don't know
11 how -- how it was sent or received.

12 Q Okay. But -- so -- okay. But you're
13 not disputing that -- that there was a letter
14 sent to Fourth Corner from Esther George in
15 January 2015, in which she says the master
16 account decision is within the Reserve Bank's
17 discretion?

18 A That's right.

19 Q Okay. And if you move down two
20 paragraphs, the last full -- or last paragraph on
21 the page says, "Nevertheless, on July 16, 2015,
22 the Kansas City Fed denied Fourth Corner Credit

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1 Union's request for an account."

2 Do you see that?

3 A I do see that.

4 Q And it goes on to say, "The denial
5 letter focused primarily on risks presented by
6 Fourth Corner."

7 Do you see that?

8 A I do.

9 Q So this -- this suggests that it was
10 the Reserve Bank of Kansas City that made the
11 decision to deny Fourth Corner's request, right?

12 MR. SCARBOROUGH: Objection.

13 THE WITNESS: It doesn't say -- lead to
14 those -- sorry. It doesn't specify the
15 participation or lack of participation of the
16 Board of Governors.

17 In coming to the tentative conclusion
18 that I offered to you in testimony today, it's
19 possible that I was relying on Julie Hill's other
20 article or the other materials that are not
21 included here.

22 I do recall more extended discussion

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1 either in the briefing or in the scholarship that
2 talked more specifically about the Board of
3 Governors' participation in that decision.

4 BY MR. MICHAELSON

5 Q Okay. And sitting here today, what do
6 you recall about that?

7 A Only that the decision was guided by
8 the Board of Governors, that this was not an
9 independent decision of the Federal Reserve Bank
10 of Kansas City.

11 Q It's your recollection that the Board
12 of Governors guided the decision?

13 A It's my recollection that the decision
14 was not an independent decision of the Federal
15 Reserve Bank of Kansas City.

16 Q Well, those are two different things,
17 right?

18 A Yeah.

19 Q So what's your opinion?

20 A That the decision was not an
21 independent decision of the Federal Reserve Bank
22 of Kansas City and Fourth Corner.

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1 Q Okay. When you say it was not an
2 independent decision, is that consistent -- I
3 want to understand how you're using that term.

4 Is that consistent with the Reserve
5 Bank of Kansas City denying it in the exercise of
6 its own discretion after having consulted with
7 other parties like the Board?

8 MR. SCARBOROUGH: Objection to form.

9 THE WITNESS: My understanding --
10 again, and the expert report didn't include it in
11 that section, not because I don't have a view on
12 the Board's participation, but because the
13 materials I reviewed in writing my expert report
14 were more conclusive with respect to the
15 Territorial Bank of American Samoa and The Narrow
16 Bank than in Fourth Corner.

17 But still sticking with Fourth Corner,
18 my understanding and my review of the materials
19 as I sit here today is that the -- the Kansas
20 City Fed did more than consult with the Board in
21 reaching its own independent decision, that, in
22 fact, the Board had a view, and that view was to

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1 Q Okay.

2 A -- not --

3 Q And --

4 A -- not after the crisis itself.

5 Q And it was related to the crisis,
6 correct?

7 A Chronologically, it was related to the
8 crisis. It was occurring in the -- during the
9 crisis.

10 Q Right. But also the intent behind it
11 was -- was in part framed by addressing the
12 crisis, correct?

13 A I'd have to know more what you mean.
14 Whose intent do you mean?

15 Q It's okay. Not important.

16 Fair enough to say that The Narrow
17 Bank's business model would not have been
18 possible prior to 2008, correct?

19 A Can you say more about which aspect of
20 The Narrow Bank's business model you have in
21 mind?

22 Q Well, its model involved arbitraging

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1 the payment on excess reserves, right?

2 A Again, the terms you're using have
3 specific terms of art in finance and law, and I
4 want to make sure that I'm being precise for you
5 and for the Court.

6 My understanding of The Narrow Bank's
7 business model is based on -- is not at the core
8 of my expert report. I haven't evaluated that
9 business model sufficiently to offer -- offer an
10 expert opinion.

11 Q So you haven't evaluated The Narrow
12 Bank's business model sufficient to offer an
13 opinion on that right?

14 A That's right.

15 Q And you haven't evaluated Custodia's
16 business model sufficient to render an expert
17 opinion on that, right?

18 A That's right.

19 Q Yet it's your opinion that the Federal
20 Reserve denying access to services to these
21 entities amounts to the Fed acting as a
22 rechartering authority, right?

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1 A My -- my opinion is that by inserting
2 itself into the question of access to, in these
3 cases, master accounts, that the Federal Reserve
4 is acting inconsistent with the intents --
5 intentions of the framers of the MCA and that
6 that process, including the principles identified
7 in its 2022 guidelines and its -- the
8 instantiations of those principles and these
9 cases, amounts to a process of -- of similar
10 evaluation to a chartering process.

11 Q But in order to form that opinion,
12 don't you have to know what these business models
13 are?

14 A No.

15 Q So your -- your opinion in this case is
16 sort of agnostic as to what business is
17 requesting a master account?

18 A My opinion on this is agnostic as to
19 the business models of legally eligible
20 depository institutions, yes.

21 Q So even though every bank -- every bank
22 is different, right? We've been over this.

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1 A That's right.

2 Q Every bank's a snowflake, and every
3 bank presents risk to the system, right?

4 A That's right.

5 Q Some banks present more risk to the
6 system than other banks, right?

7 A Again, that's a determination that I
8 don't know that I could -- I could make about
9 what kinds of risks are imposed and how to
10 compare, for example, reputational risk to
11 financial risk to legal risk.

12 Q Okay. But you'd agree that all -- all
13 banks present risk, right --

14 A Yes.

15 Q -- to the system?

16 And each bank is different, right?

17 A Right.

18 Q So each bank will present a different
19 risk to the system, right?

20 A Right.

21 Q And it's your opinion that all these
22 banks, pursuant to the MCA, intent behind the

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1 MCA, must get access to an account, right?

2 A All legally eligible depository
3 institutions, the intent of the framers of the
4 MCA was to give them access on equal terms to
5 Federal Reserve services, yes.

6 Q Okay. And that once they have an
7 account, you're not precluding the possibility
8 that the Federal Reserve can conduct a risk
9 assessment concerning each institution, right?

10 A That's -- it's correct that I'm
11 asserting that the Federal Reserve's risk
12 assessments pursuant to regulation is consistent
13 with the Fed's practices after the passage of the
14 Monetary Control Act.

15 Q But to the extent that they restricted
16 use of any service in perpetuity, that would be
17 inconsistent with the intent behind the Monetary
18 Control Act? That's your opinion?

19 A The --

20 MR. SCARBOROUGH: Objection.

21 THE WITNESS: My opinion is that the
22 intent of the framers of the Monetary Control Act

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1 was not to give the Federal Reserve the authority
2 to impose membership entrance standards for
3 federal -- use of Federal Reserve services as it
4 had done prior to 1980, after the passage of that
5 act.

6 BY MR. MICHAELSON

7 Q Okay. So The Narrow Bank is a
8 state-chartered nonmember bank, right?

9 A That's right.

10 Q Like Custodia, right?

11 A Chartered by the state of Connecticut,
12 where Custodia was chartered by Wyoming.

13 Q Right. But both are state-chartered
14 nonmember banks, right?

15 A That's right.

16 Q And so it's your opinion that the
17 Federal Reserve -- that the Monetary Control
18 Act's intent was to force the Federal Reserve to
19 give entities like that access to services
20 irrespective -- without the Federal Reserve being
21 powered to conduct a risk assessment?

22 A My opinion is that the intent of the